No. 11,969

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD J. McBRIDE, doing business as Continental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY (a corporation),

Appellee.

AMICUS CURIAE BRIEF ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF SAID STATE.

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Leave of the Court having been first sought and obtained, the People of the State of California and the Public Utilities Commission of said State file this their brief as amicus curiae.

I.

PRELIMINARY STATEMENT.

We contend that the judgment of the District Court is correct and is soundly and sufficiently based upon the

tariff rule and regulation[1] filed by appellee with the Federal Communications Commission, which authorized appellee to discontinue the interstate wire service involved herein, in the circumstances shown by the record. We shall discuss this point more fully hereafter. We do not take the position that the validity of the decision of the Public Utilities Commission, concerning communications service, facilities and instrumentalities, constitutes a lawful issue in this case, for the reason that said decision comprehends only—and necessarily so—intrastate communications service. The interstate communications field has been completely occupied by the Federal government by the enactment of the Communications Act of 1934[2] and by thus preempting said field has swept away any State jurisdiction theretofore existing. Our position is that the validity of said decision of the Public Utilities Commission is not before this Court as a lawful issue in this case, because it could have no application to the subject matter of this action, which is concerned exclusively with interstate communications service. Said decision of said Commission shows on its face that it extends only to communications utilities operating under the jurisdiction of said Public Utilities Commission. In its interstate communications operations, appellee does not operate under the jurisdiction of said Public Utilities Commission.

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[1]Said tariff rule and regulation provides in part as follows:

"Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law."

[2]47 U.S.C.A. 151-609.

For the foregoing reasons, it is our view that the validity of said decision of said Commission is not a lawful issue in this case.

II.

THE PUBLIC INTEREST IS VITALLY CONCERNED AND INVOLVED IN THE ISSUES OF THIS CASE.

On the issue of the public interest, we here point out that the invalidation of this tariff rule and regulation, filed by appellee with the Federal Communications Commission, would render practically impotent the several States to adequately enforce their laws denouncing "bookmaking" as a public offense. This result would derive from the fact that the States would then be practically defenseless against their being flooded by the racing information (the indispensable base for the very existence of successful "bookmaking") carried over the interstate telegraph wire leased by appellee to appellant. The sustaining of the validity of said tariff rule and regulation is most important to the People of the State of California.

Although the legal effect of the decision of the Public Utilities Commission, heretofore referred to under "Preliminary Statement" (p. 1, supra), applies only to intrastate communications, as we there pointed out, and does not constitute a lawful issue in this case, we do desire to point out that the opinion part of said decision and the findings of fact therein are very illuminating, as applied to the interstate wire service involved in this case. (Record, pp. 56 to 69.) To illustrate the methods and means employed by the appellant in furnishing this wire

service for criminal ends, we quote from the opinion of the decision of said Public Utilities Commission as follows:

"The testimony indicated that there has developed in the United States special racing news-gathering services. Among these are the Continental Press Service and the Pioneer News Service. According to the testimony, the Continental Press Service consists of a wire service which is leased from the Western Union and which has outlets at various cities throughout the United States; specifically, this press service has the following drops in California:

Name of Subscriber	Address	Date Service Started
Tejon News	1911 Edison Highway Bakersfield	5-12-45
Consolidated Publishing Co.	615 N. La Brea Ave., Los Angeles	5-12-45
Los Angeles Journalist	208 W. 8th St. Los Angeles	5-12-45
George Zouganiles	181 Andreas Rd. Palm Springs	9-3-46
Arrowhead News	362 D Street San Bernardino	8-12-46
Colton News	211 Platt St. San Bernardino	8-12-46
Southwest News	919 4th Avenue San Diego	11-5-45
Krelling & Cohen	333 Montgomery St. San Francisco	5-12-45

This press service is a Morse wire and the drops consist of both sending and receiving telegraph sets.

"The Pioneer News, having headquarters at 333 Montgomery Street, San Francisco, California, is a

service consisting of a wire leased from Western Union, over which is operated teleprinter or ticker sets. These teleprinters are the same instruments as are used in reporting stock-market news and are located at various drops in California; specifically, these locations are:

Name	Address	Date Service Started	Date Temp. Discon.
Roy Simon	1910 Tuolumne St. Fresno	6-22-46	2-19-48
J. Bozeman	326 Virginia St. Vallejo	5-25-46	1-29-48
W. Musso	215 Georgia St. Vallejo	5-25-46	1-29-48
J. Farrell	216 Georgia St. Vallejo	5-25-46	1-23-48
Mint Smoke Shop	237 Georgia St. Vallejo	8-14-47	1-29-48
Del Kennedy	1160 Old Country Rd., Belmont	10-8-45	2-19-48
M. Mage	1617 Old Country Rd., Belmont	7-19-47	2-19-48
C. Atkin	145 Montgomery St. San Francisco	10-8-45	2-19-48
Pioneer News	127 Montgomery St. San Francisco	1-30-46	2-19-48
F. Masonic	145 Mason St. San Francisco	3-4-46	2-19-48
101 Service Station	Bayshore Highway Bayshore	1-31-47	4-16-48
Andy's Service	2637 Bayshore Hwy. Bayshore	8-16-47	1-30-48
Geneva Club	2201 Geneva Ave. Bayshore	11-17-47	2-19-48

It will be noted from an analysis of the above table that most of the drops of the Pioneer News Service were temporarily disconnected after the commencement of these hearings on February 18, 1948.

"While the technical equipment of these two wire services, the Continental Press and the Pioneer News, are different in that one uses telegraph keys and the other uses teleprinters, still, in other respects, the basic method of operation is similar. Information as to this method of operation was produced at the hearing. Since the Continental Press and the Pioneer News are among those services which are barred from the race tracks, they use various unorthodox methods to obtain information. The most common of these methods, according to the testimony, is to use 'signalers' or 'wigwaggers', individuals who attend the races at the track and, by a system of signals, relay information to confederates outside who, in turn, send the information to the wire services.

"Exhibits Nos. 33 to 37, introduced in evidence, consist of photographs showing a phone installation and a telescope in a house within view of the Santa Anita Race Track. The equipment shown in the photographs was used by one Ed Coplansky who, apparently, employed a telescope to observe signals from wigwaggers within the track. The information so obtained was telephoned to a drop of one of the wire services. The phone used by Coplansky was one which illegally had been tapped into the phone line of the owner of a nearby house.

"The apparent reason these specialized wire services go to such extremes to obtain information is that special information is needed by their clients in order to conduct successful bookmaking activities. According to the testimony the information sent out over the regular news services and published in the regu-

lar newspapers, and even the detailed description of the running of races given over the radio, do not supply sufficient details to permit successful bookmaking. A bookmaker needs the following information: (1) direct race odds and fluctuations in these odds; (2) the post time; (3) the exact off time within a matter of seconds; (4) a brief description of the race; (5) results of the race; (6) prices paid. In addition, a bookmaker needs information as to last-minute jockey changes and track conditions. These details are only furnished by the special racing wire service agencies.

"As previously indicated, this detailed information is obtained at the race track by one device or another, then it is phoned to one of the offices of the wire service. At this office the information is placed on the wire and is immediately relayed to all of the drops of that particular wire service. Testimony was presented showing the operation of these drops. As soon as racing information is received it is called over a loud-speaker system. In front of the loud speaker are various phones, with the receivers off the hook, and, apparently, at the other end of these phones, bookmakers are listening for the information. Thus, in a matter of seconds, it is possible to get the information from the track to the bookmakers.

"Testimony was presented by various police officers and sheriff's office employees as to visits they had made to these various wire service drops. In each of these places, according to the testimony, there are multiple phone installations. Instances were reported of as many as 26 phones in one room and other testimony presented by the telephone company showed the subscribers to these various phones. Photostatic copies of the telephone cards listing the names of these subscribers were received in evidence

as Exhibits Nos. 38 to 79, inclusive, and 80 to 92, inclusive. A general examination of these cards discloses that, while there were several phones in one place, most of them were listed under various fictitious names, including such terms as secretarial services, process service, research companies, printing companies, welding works, and, also, the names of various individuals.

"Apparently, multiple phone installations are a necessary part of the equipment used in disseminating racing information to bookmakers. Testimony was presented indicating that, in some cases, these multiple phone installations result from unauthorized extensions of existing facilities, while in other cases they are made by the telephone companies.

"Exhibits Nos. 16 to 27, inclusive, consist of photographs taken by a sergeant of the Los Angeles Police Department, showing the facilities at some of the wire service drops in Los Angeles. In each of these instances equipment consists of an instrument for receiving information over the telegraph wire and several phones for relaying this information to outside subscribers. These outside subscribers pay for this service at rates varying from $4.00 per month to $339.24 per month. There is set out below the rates paid by the eight subscribers to the Continental Press Service previously listed:

Subscriber	Monthly Charge
Tejon News	$144.40
Consolidated Publishing Company	63.00
Los Angeles Journalist	4.00
George Zouganiles	72.27
Arrowhead News	65.93
Colton News	4.00
Southwest News	197.67
Krelling & Cohen	339.24

"Additional testimony was presented by police officers as to raids they had made on various locations within the State of California. At some of these locations, including drops on the previously mentioned wire services, it was found that bookmaking was being carried on.

"Testimony was received from representatives of the Western Union, setting out the manner in which these wire services are furnished. Arrangements for the Morse wire used by Continental Press were made in Cleveland, Ohio, and the charges for that lease are paid at Cleveland. The Pioneer News lease, which started October 8, 1945, was arranged for by Stanley Cohen, and, apparently, the main office of Pioneer News is 333 Montgomery Street, San Francisco, California." (Record, pp. 59 to 65.)

Modern invention has placed into the hands of the criminal element of our society formidable implements, instrumentalities and weapons and the criminal is utilizing these weapons in a manner and with maleficent effect truly representative of the modern atomic age. The so-called "bookie" racket is an example. The law must be realistic and keep abreast of this race to pervert progress in invention to the fell purpose of organized crime. The public interest demands that the law, on its part, be as resourceful and progressive and—if you please—as realistic as are the cynical leaders of the criminal syndicates. The battle between decency and law and order, on the one side, and organized crime, on the other, increases in intensity as mankind progresses on the material plane of existence. The brazenness of this "bookie" racket should be met by the resourcefulness of which the law has shown

itself capable in the past, within accepted and legitimate bounds, but see to it that these legitimate bounds are fully reached and occupied.

We do not take the position that the rules of law should be tortured into special application to meet this threat of organized crime without and beyond the accepted standards of due process and equal protection of the law. We do contend, however, that, while rules and principles of law do not change, the facts and circumstances of a situation may call for a *changed application* of the rules. Power of government does not change but special circumstances may call forth and give rise to legitimate application of a power of government that in different circumstances lawfully could not have been applied.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387; 71 L. ed. 303, 310;

Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 426; 78 L. ed. 413, 422.

As illustrative of the foregoing principle, we quote from the decision of the Supreme Court of the United States in the case of *Village of Euclid v. Ambler,* supra:

> "* * * Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there

> is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning,* but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall." (272 U.S. 365, 387; 71 L. ed. 303, 310.) (Emphasis by the Court.)

The rule there announced is applicable here. Society is faced with a cankerous evil in this "bookie" racket and the law must apply its power and authority in a manner commensurate to deal with such problem, all of the circumstances and special situations being taken into consideration. The law is not impotent. The law must be stable, of course, but it must not and cannot stand still—it must make progress. The foregoing cited text from the decision of the Supreme Court of the United States in the *Euclid* case would seem to attest the correctness of this view.

The particular situation which the Supreme Court of the United States addressed itself to in the case of *Home Building and Loan Association v. Blaisdell,* supra, was that of an emergency but it here may be pointed out that the existence and growth in our body politic of criminal syndicates may well be likened to an emergency which faces society, thus calling forth the existing powers of government to cope with the special circumstances and

conditions with which society finds itself faced. Certainly, the pouring of this racing information into the several States by interstate means, creates an emergency in law enforcement as applied to the individual State. Also, it is a rule of law that government, in fashioning implements and instruments to accomplish a legitimate objective, is given wide latitude in its choice of implements and instruments in light of all the facts and surrounding circumstances and the nature of the evil sought to be abated. It is an elementary rule of law that once it be determined that an objective to be reached is a legitimate one, all necessary and reasonable means may be availed of and employed to accomplish that objective. Government is free to design its instruments in a manner best calculated to achieve a legitimate end and, if such instruments so designed are not clearly unreasonable, Courts should not invalidate them. Courts should be most circumspect to see that there is accorded to government the benefit of every legitimate presumption in approaching the question of the validity and legitimacy of such instrumentalities.

Pacific States Box and Basket Co. v. White, 296 U.S. 176, 185-186; 80 L. ed. 138, 146;

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69; 81 L. ed. 510, 518;

Lewis v. Potomac Electric Power Co. (Court of Appeals of D. C.), 64 F. (2d) 701, 702.

In the *Pacific States Box and Basket Company* case, supra, the Supreme Court lays this rule down in the following words:

"* * * The order here in question deals with a subject clearly within the scope of the police power. See Turner v. Maryland, 107 U.S. 38, 27 L. ed. 370, 2 S.

Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187."

* * * * * * *

"It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare Panama Ref. Co. v. Ryan, 293 U.S. 388, 79 L. ed. 446, 55 S. Ct. 241, and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to stat-

utes, to municipal ordinances, and to orders of administrative bodies. Compare Aetna Ins. Co. v. Hyde, 275 U.S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174." (296 U.S. 176, 185-186; 80 L. ed. 138, 146.)

Also, this rule is restated by the Supreme Court in the *Thompson* case, supra, as follows:

"* * * It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise. Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185, 80 L. ed. 138, 146, 56 S. Ct. 159, 101 A.L.R. 853." (300 U.S. 55, 69; 81 L. ed. 510, 518.)

While it is true that the above-cited cases address themselves to a regulation promulgated by an administrative agency, the same rule applies to a rule or regulation promulgated by a public utility, which is filed with a regulatory body and is approved by that body, as is the case with the tariff rule involved in this action. The rule of law with regard to the interpretation and construction of these two types of rules and regulations is the same.

Lewis v. Potomac Electric Power Co. (Court of Appeals of D. C.), 64 F. (2d) 701, 702;

Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 114; 81 L. ed. 540, 544.

No rule of law is more firmly established than the principle, which holds that the law will lend no aid to an attempt at its own violation.

Tracy v. Southern Bell Telephone and Telegraph Co. (District Court of U. S., Southern District of Florida), 37 F. Supp. 829.

The *Tracy* case well points out this rule as follows:

> "Although telephone companies, as public utilities, are required to furnish their facilities to the public indiscriminatively so long as such facilities are used for lawful purposes, it is well settled that a telephone company may refuse, and cannot be compelled, to furnish service which will be used, or which the Telephone Company has reasonable cause to believe will be used, in furtherance of illegal enterprises. No one can be compelled to aid in an unlawful undertaking. The procuring and placing of wagers on horse races in the manner followed by the plaintiffs is unlawful in Florida. Plaintiffs cannot invoke the processes of a court of equity to restrain defendants from discontinuing a public service which the Telephone Company had probable cause or reasonable grounds to believe is being used in the maintenance and conduct of such illegal or immoral enterprise. Hamilton v. Western Union Tel. Co., D. C., 34 F. Supp. 928; People v. New York Telephone Co., 173 App. Div. 132, 159 N.Y.S. 369; Godwin v. Carolina Telephone & Telegraph Co., 136 N.C. 258, 48 S.E. 636, 67 L.R.A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203; Smith v. Western Union Tel. Co., 84 Ky. 664, 2 S.W. 483; Bryant v. Western Union Tel. Co., C. C., 17 F. 825." (37 F. Supp. 829-830.)

See also to the same effect:

Hamilton v. Western Union Teleg. Co. (U.S. D.C.—N.D. of Ohio), 34 Fed. Supp. 928, 929.

Appellant contends that furnishing of information concerning horse racing is not unlawful. Such statement tells only a small part of the story involved in this case. Appellant omits to state the *purpose* for which such infor-

mation is furnished and the *knowledge* by the seller that it is to be used for such *purpose.* An otherwise lawful act may be converted into an unlawful one when conjoined to other acts and circumstances seeking *to accomplish an unlawful end.*

Western Union Teleg. Co. v. Foster, 247 U.S. 105, 114; 62 L. ed. 1006, 1016.

It is not unlawful to sell an axe, in and of itself, but, if the seller of the axe knows that the purchaser is purchasing it for the purpose of murdering a man standing on the sidewalk outside the shop door of the seller, would it be contended that the act of the seller is lawful? Suppose a common carrier of passengers should engage in a regular and systematic carriage of persons to a place of assembly for the purpose of organizing a rebellious undertaking against the government, and such carrier knew of the purpose of such passage, could it be contended that the carrier's conduct was lawful or could it be contended that the carrier, lawfully, could not refuse transportation to such conspirators and that courts would direct the carrier to continue to transport persons to such criminal rendezvous? The foregoing are not over-simplifications of the issues involved herein. The appellant, in furnishing the service he does, *knows* for what use it is desired and to what use it is being put and will be put. He *knows* that its use gives rise to a nation-wide gambling system in violation of the laws of many of the States denouncing "bookmaking" as a public offense. He *knows* that it is the breath of life, the sustenance and very existence of the so-called "bookie" racket and the foundation upon which rest the insidious cesspools of crime extending

throughout many of the States, including California, euphemistically denominated "horse parlors," wherein underworld characters forgather in a miasma of law defiance and where organized crime hatches and breeds. Were there no "bookie" operators, there would be no market for appellant's illicit wares. It is these "harmless" and "lawful" undertakings that the appellant's "innocent" service feeds and sustains and he has *full knowledge* of all these facts. If there were ever a case in all history where a petitioner praying for equity entered a Court with, not only unclean hands, but filthy and dirty hands, this is the case. Surely, Equity must have winced and drawn her virginal robes more closely about her, when she perceived the full import of the burden of appellant's complaint praying for the application and intercession of her beneficent ministration.

A reading of the opinion and findings contained in the decision of the Public Utilities Commission (Record, pp. 56-69) will demonstrate the truth of the foregoing statements concerning the "innocent" and "lawful" conduct of appellant.

Appellant, with critical innuendo, speculates in his opening brief (page 32 thereof) as to why the Public Utilities Commission injected itself into this wire service matter by instituting the investigation out of which issued its decision concerning unlawful use of communications service, facilities and instrumentalities. We readily and gladly answer appellant's "speculating" by stating that the Public Utilities Commission is not required to explain to or to notify, in advance, gamblers and "horse parlor"

operators of its intention to discharge its duty under the law. When it became reasonable to believe that communications facilities and instrumentalities within the State of California were being perverted and prostituted to the profit and benefit of criminal syndicates and correspondingly to the detriment of the people of said State and law enforcement, in general, it moved to abate such unlawful use of legitimate instruments of commerce and communication. It will continue in the discharge of its lawful duty concerning this subject, "bookmakers" to the contrary notwithstanding.

III.

TARIFF RULE AND REGULATION FILED BY APPELLEE WITH FEDERAL COMMUNICATIONS COMMISSION IS VALID AND BINDING ON APPELLANT.

The tariff rule and regulation filed by appellee with the Federal Communications Commission, so far as pertinent here (see p. 2, supra), is a reasonable exercise by the utility of its power and duty to protect itself from aiding in and abetting the commission of crime. The instrument of protection *must be constructed in light of the evil sought to be protected against.* Obviously, the law does not require a telegraph company to lay itself open to such an extreme hazard, that it subject itself to a charge of aiding and abetting the crime of "bookmaking" before it may lawfully discontinue service or refuse to furnish service. Rules and regulations of this nature (practically identical therewith as to wording) have been upheld in several instances.

Partnoy v. Southwestern Bell Telephone Co. (Missouri Public Service Commission, June 13, 1947), 70 P.U.R. (N.S.) 134, 144, 149. — Rule involved therein is substantially identical with rule involved in this case.

Rodman v. New England Telephone and Telegraph Co., (Massachusetts Department of Public Utilities, November 20, 1945), 61 P.U.R. (N.S.) 242. — Rule involved therein is substantially identical with rule involved in this case.

Carrozza v. New England Telephone and Telegraph Co., (Massachusetts Department of Public Utilities, November 23, 1945), 61 P.U.R. (N.S.) 249. — Rule involved therein is substantially identical with rule involved in this case.

Tracy v. Southern Bell Telephone and Telegraph Co., 37 F. Supp. 829. — Discontinuance upon notification by State Attorney General that service was being put to an unlawful use. No rule or other authority purporting to grant to a law enforcement officer the authority to make such request or demand was involved.

Because of the especial pertinence to this particular subject, we set out in full in this brief as Appendix "A" the decision in the *Partnoy* case, supra. Also on this particular phase of the subject, we quote from the decision of the Public Utilities Commission pointing out the positive duty of a communications utility to police its service:

> *"The right of a person to utility services, such as telephone and telegraph, is not an inherent right but*

is due solely to the fact that the State, in the exercise of its police power, has seen fit, under the provisions of the Public Utilities Act, to require the utility to serve the public without undue or unreasonable discrimination. It, therefore, must be concluded that the State, having the authority to compel a utility to render service, has the authority to impose conditions under which such service may be furnished or terminated. (See Partnoy v. Southwestern Bell Telephone Co., Missouri Public Service Commission, June 13, 1947, 70 P.U.R. (N.S.) 134.) It is established by statute in this State that a telephone or telegraph company is not required to accept messages which will 'instigate or encourage the perpetration of any unlawful act * * *' (Section 638, Penal Code.) (Emphasis supplied.)

"It is the positive duty of a communications utility to exercise vigilance to prevent the unlawful use of its instrumentalities and facilities. Such utility exercises a valuable and extraordinary privilege and, in turn, incurs corresponding obligations to the public. Surely, one of its highest obligations is to exercise vigilance to see that its instrumentalities and facilities are not used in aiding and abetting the commission of crime. We are not so naive as to believe that the operators of wire services, as discussed in this decision, can conduct their business of disseminating racing information without general knowledge as to the activities of their customers. The evidence in this case shows that some of the users of these wire services are engaged in bookmaking. The evidence further discloses instances of multiple telephone installations, which installations are aiding the activities of bookmakers. Therefore, we believe that any such installations should be scrutinized very carefully

by the utilities furnishing the services and that additional installations should not be made without careful inquiry as to the nature of their use.

"It is the conclusion of this Commission that communications instrumentalities and facilities should not be furnished to persons who will use them for bookmaking or related illegal purposes; nor should they be furnished where there is strong evidence to indicate that the use will be for such illegal purposes. Neither should the furnishing of such instrumentalities and facilities be continued where reasonable cause exists for believing that such facilities are being so used. There is a duty resting upon communications utilities to refuse installations or to discontinue service when these conditions exist. There is a further duty on the utility to make reasonable inquiry as to the use of facilities and, in particular, this is true where the facilities are being installed in unusual circumstances." (Record, pp. 67 to 69.)

We wish to here point out that the cases cited by appellant on the subject of authority or lack of authority of a law enforcement officer to request or demand discontinuance or refusal of telephone or telegraph service do not involve a rule or other authority permitting or purporting to permit or authorize a law enforcement officer to request or demand discontinuance or refusal of service, as is the case here. Of course, the absence of a rule or other authority on this point makes all the difference in the world from a legal standpoint.

The case of *People v. Brophy,* 49 Cal. App. (2d) 15, cited by appellant as an authority upholding his position, will illustrate the invalidity of appellant's contention.

The *Brophy* case involved telephone service of the Southern California Telephone Company, which service was purely intrastate. No statute of California authorized a law enforcement officer to demand or request discontinuance of telephone service. No order, rule or regulation of the Public Utilities Commission of that State authorized a law enforcement officer to make such request or demand. No rule or regulation of the utility involved in that case contained any such provision. While it logically may be argued that the act of the Attorney General involved in that case was well within the spirit of the law because of the unlawful use of the telephone service involved, the legal situation is that the courts took a contrary view and would appear to have gone to extreme limits in rendering the decision which was rendered in that case. The demand there made by the Attorney General of the State of California upon the telephone company to discontinue service to alleged "bookmakers" was held by the courts to have been without authority in law.

The vital difference between the situation in the *Brophy* case and other similar cases, upon which appellant relies, and the situation in the instant case is that they did not involve, *as is involved in this case,* a *rule* or *other authority* permitting the telephone or telegraph company *to discontinue service upon receiving notification by a law enforcement officer that such service is being used contrary to law.* The difference between the situation in the *Brophy* case and the situation in the instant case is that the law *authorizes* the doing in the instant case of that which *was not authorized* in the *Brophy* case.

It is elementary that regulatory rules prescribed by regulatory bodies or filed with such bodies by the regulated utilities and by such bodies approved have the force and effect of law and are presumptively valid. A heavy burden rests upon one attacking such rule to demonstrate its invalidity.

Pacific States Box and Basket Co. v. White, 296 U.S. 176, 185-186; 80 L. ed. 138, 146;

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69; 81 L. ed. 510, 518;

Lewis v. Potomac Electric Power Co. (Court of Appeals of D. C.), 64 F. (2d) 701, 702.

It is also an elementary rule of law that, where the claim of unlawfulness of a rule or regulation is grounded in lack of *reasonableness, the objection on that ground must be addressed to the regulatory authority having jurisdiction to issue or approve such rule and not as an original matter brought to a court.*

Ambassador, Inc., v. United States, 325 U. S. 317, 324; 89 L. ed. 1637, 1642.

See also:

N.L.R.B. v. Link Belt Co., 311 U. S. 584, 597; 85 L. ed. 368, 377.

In the *Ambassador* case, the Court stated as follows:

"But we agree with the District Court that where the claim of unlawfulness of a regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court." (325 U. S. 317, 324; 89 L. ed. 1637, 1642.)

The *Ambassador* case involved a regulation of a telephone company filed with the Federal Communications Commission. This is the exact situation in the instant case with the difference that a telegraph utility is here involved. The principle is exactly the same. The question of whether or not the tariff rule and regulation, upon which appellee relies as a defense, is *reasonable* must be addressed to the Federal Communications Commission and not to the District Court or to this Court. Appellant is free to file with the Federal Communications Commission a complaint against appellee attacking the validity of this tariff rule and regulation. He has not seen fit to do so. Therefore, he is concluded by such rule and regulation, so far as this Court is concerned.

The cases cited on page 26 of appellant's opening brief are not in point at all because no rule was therein involved, so far as reasonableness thereof was concerned. Appellant's assertion that the reasonableness of the tariff rule of appellee is not an issue, herein, does not make such the fact. Of course, appellant wants to ignore this tariff rule.

Appellant appears to be in a quandary as to why the District Court denied him relief. The answer is simple. Under the tariff rule and regulation of appellee, appellant was not lawfully entitled to a continuation of the service theretofore furnished him by appellee. Obviously, the District Court had to deny appellant relief, when it is realized that this tariff rule and regulation became and was a condition of the contract between appellant and appellee covering the wire service in question, being a

part of the application for said service, which application appellant executed.

Appellant, at page 9 of his opening brief, states that the appellee discontinued the wire service in question on April 2, 1948, "pursuant to the order of the Public Utilities Commission of the State of California and the letter of the Attorney General." We wish to point out that this is an incorrect statement of the Record and of the fact. On page 48 of the Record in this case, it is shown that appellee discontinued service on that date pursuant to letters written to it by the Attorney General of the State of California and a District Attorney. The Record does not state that the discontinuance was caused by an order or decision of the Public Utilities Commission. As a matter of fact, the decision of the Public Utilities Commission was not issued until April 6, 1948, and did not become effective until twenty days thereafter. (Record, page 71.)

IV.

JURISDICTION AND AUTHORITY OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

While the validity of the decision of the Public Utilities Commission is not a lawful issue in this case, we, however, desire to point out the legal status of said Commission in the orbit of the State government. By the provisions of Sections 17, 19, 20, 21, 22, 23, and 23a of Article XII of the constitution of the State of California and the Public Utilities Act of said State (Statutes of California 1915, Chapter 91, as amended), said Commission is given plenary and

exclusive authority over public utilities, so far as their supervision and regulation are concerned. (Section 31 of said Act.) It is provided in Section 23 of said Article XII of said Constitution that the "right of the Legislature to confer powers upon the railroad commission" (now Public Utilities Commission) "respecting public utilities is hereby declared to be plenary and to be *unlimited* by any provision of this constitution." (Emphasis supplied.) The same provision is to be found in Sections 22 and 23a of said Article. It will be seen that not only may the Legislature confer on the Commission any and all authority the former may possess over public utilities but may also confer powers upon said Commission that the Legislature itself could not exercise because of constitutional restrictions imposed directly upon the Legislature. The only restraint imposed upon the Legislature and the Commission in this regard, is that afforded by the Federal constitution.

The foregoing constitutional provisions and the Public Utilities Act have received interpretation at the hands of the Supreme Court of the State of California and the plenary authority conferred by the constitution and the Public Utilities Act has been broadly upheld by that Court.

Pacific Telephone and Telegraph Co. v. Eshleman, 166 Cal. 640, 650, 689;

Clemmons v. Railroad Commission, 173 Cal, 254, 258;

City of San Jose v. Railroad Commission, 175 Cal. 284, 290;

Miller v. Railroad Commission, 9 Cal. (2d) 190, 195, 198;

Sale v. Railroad Commission, 15 Cal. (2d) 612.

From the foregoing cited authorities, it is clear that the Public Utilities Commission has plenary and exclusive authority and control over *intrastate* communications service, facilities and instrumentalities, so far as supervision and regulation are concerned.

V.

APPELLANT'S CLAIM OF IRREPARABLE INJURY.

To state it most mildly, appellant has summoned up outstanding hardihood to allege with a straight face that he will suffer irreparable damage, if he is not permitted to continue to ply his trade. If an aider and abettor of law violation may claim irreparable damage when restrained from such unlawful conduct, then appellant stands upon sound legal ground in this case. What appellant is really requesting of the law is that courts place a premium upon the aiding and abetting of law violation. Of course, the fallacy of appellant's position is that he *assumes as a premise* that his activity in operating this "blood bank," "oxygen tent" or "feeder" for the national "bookie" racket *is lawful.* Appellant should remember that no man, lawfully, may claim or base a property right in that which is unlawful.

VI.

DELICACY OF APPELLEE'S POSITION IN THIS CASE.

It is obvious that appellee is not seeking to establish as a fact that it has knowledge that the activity of appellant is an unlawful one, so far as this case is concerned. Appellee's position is a delicate one. On the one hand, it must be vigilant to see that the furnishing of service by it does not result in aiding or abetting unlawful conduct and, on the other hand, it must be careful not to take action that might subject itself to a charge of discrimination in the furnishing of service. Verily, appellee finds itself in the unenviable situation of the ancient helmsman, Glaucus, who was obliged to pass between Scylla and Charybdis. In such difficult circumstances, the law must temper its application to the realities of the case and lend its aid to a public utility that is, in good faith, attempting to perform its public duty and, at the same time protect itself from a charge of aiding and abetting the commission of crime. The position of a public utility in a situation of this nature is difficult enough. Courts should not add to that difficulty by a too technical and legalistic approach to the subject.

CONCLUSION.

We are convinced and most respectfully assert that the facts of this case, interpreted in the light of legal rules and principles cited in this brief, clearly support the

judgment of the District Court and we submit that its judgment should be affirmed.

Dated, San Francisco, California,
October 11, 1948.

EVERETT C. McKEAGE,
Attorney for the People of the State of California
and
the Public Utilities Commission of Said State.

Of Counsel
RODERICK B. CASSIDY,
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BORIS H. LAKUSTA,
J. THOMASON PHELPS.

(Appendix A Follows.)

Appendix A.

Appendix A

Missouri Public Service Commission
Simon Partnoy Doing Business As
Harmony Publishing Company

v.

Southwestern Bell Telephone Co.
Case No. 11,031

June 13, 1947

Complaint by Telephone Subscriber Against Service Discontinuance at the Request of Civil Authorities; Dismissed.

By the Commission: Simon Partnoy (hereafter called complainant), an individual, doing business under the fictitious name of Harmony Publishing Company, on March 18, 1947, filed with the Commission his complaint charging that Southwestern Bell Telephone Company (hereafter called Company) intended to and would discontinue his telephone service because it had been ordered by the Honorable Phil M. Donnelly, governor of the state of Missouri, and the Honorable J. E. Taylor, attorney general of the state of Missouri, to discontinue the telephone service to complainant's place of business in the Columbia Bank building in Kansas City, Missouri, for the reason that such telephone service was being used as an instrumentality to violate the laws of the state of Missouri. Complainant further set out in his complaint that he was engaged in the lawful business of disseminating news of horse races and other sporting events by means of telephone equipment furnished by the Company. Com-

plainant further charged that he was not violating any law and that he was paying the required rates for the telephone service he was receiving, and was willing to continue to pay the required rates and asked the Commission to make an order upon the Company, requiring it to continue furnishing the telephonic service to complainant.

On March 18, 1947, the Commission issued its order directed to the Company, ordering it to satisfy the complaint or to answer within ten days. Thereafter, on March 25, 1947, the Honorable J. E. Taylor, attorney general, filed a motion for leave of the state of Missouri to intervene and to be made a party to the cause.

On March 29, 1947, the Company filed its answer, alleging that it had on file with the Commission and in effect a valid and binding tariff rule and regulation which, in part, reads as follows:

Termination of Contracts

* * * * * * * *

B. The telephone company shall be authorized to discontinue service upon notice from any official charged with the enforcement of the law stating that such service is being used as an instrumentality to violate the law.

The answer further alleged that on March 11, 1947, the Company received from the governor and the attorney general of the state of Missouri a telegram notifying it that the telephone service being furnished complainant was being used as an instrumentality to violate the law, and requested the discontinuance of such service; that upon receipt of such notice the Company proceeded to

discontinue complainant's telephone service but was restrained therefrom by a temporary restraining order, issued by the circuit court of Jackson county in an action filed therein by complainant, and that after hearing that court issued a temporary injunction pending a hearing and decision by this Commission.

On April 3, 1947, complainant filed a motion to dismiss the motion of the state of Missouri to intervene. Oral arguments of counsel were heard upon complainant's said motion to dismiss and upon the state's petition to intervene, and written briefs were filed by counsel for both parties. After due consideration, the Commission, on April 11, 1947, overruled complainant's motion to dismiss and sustained the motion to intervene and granted leave to the attorney general to file answer on or before April 19, 1947; and in the same order set the cause for hearing on Tuesday, April 29, 1947. Within the time allowed, the attorney general filed answer to the complaint on behalf of the state of Missouri, charging in substance that the aforementioned rule and regulation of the Company for discontinuance of service was reasonable and necessary to the conduct of the telephone business and that the governor and attorney general had joined in a telegram to the company, advising that the service to complainant was being used as an instrumentality to violate the law and requested discontinuance of the service; that the telephone service of complainant was used solely for the purpose of broadcasting information concerning horse races, which information was used exclusively by bookmakers for the purpose of registering bets upon horse races in violation of the laws of the state of Missouri; that complainant

had no customers for this service other than bookmakers, and that the only purpose for the furnishing of the information given out by complainant over the telephones was to aid and assist bookmakers in recording bets and wagers upon horse races in violation of the law.

On April 22, 1947, complainant filed first amended complaint, in all respects the same as his original complaint, except that added thereto was a charge that the discontinuance of telephone service to complainant under the facts charged was without warrant of law, and in violation of complainant's rights under the Constitution of the United States and the Constitution of the state of Missouri. Upon the issues made by the aforementioned pleadings, hearing was held before the Commission at its hearing room in Jefferson City, Missouri, on the 29th and 30th days of April, 1947. At this hearing complainant appeared in person and by his attorneys, Harry A. Terte, Julian M. Levitt, Edward Hieby, Roy W. Rucker, all of Kansas City, Missouri, and Louis H. Cook of Jefferson City, Missouri. The Company appeared by its attorneys, John Mohler of St. Louis, Missouri, and Arthur S. Brewster of Kansas City, Missouri. The state of Missouri appeared by J. E. Taylor, Attorney General, Art O'Keefe and Pershing Wilson, Assistant Attorneys General.

The evidence produced to support the complaint was the testimony of complainant himself and a number of metropolitan newspapers that were introduced in evidence as exhibits. The complainant testified in substance to all of the facts set out in his complaint. He further testified that for the news service which he gave over the telephone facilities of the Company, he received from $50 to $100

per customer per week; that he had nine customers; that one paid $50 per week, some paid $60, some paid $75 and some paid $100 per week; that he used, in all, ten telephone lines; that the reason he had ten telephone lines but only nine customers, was because he always held one line open so that customers could call in and obtain service when they wanted it.

It was brought out on cross-examination that complainant received the sports news by Morse code telegraph ticker from Trans-American News Service in Chicago; that complainant's telegraph operator posted the information received on a bulletin board and from there it was read off by another operator over the telephones when a customer called in and asked for the service. If several customers were receiving service at the same time, the telephone transmitter connected with each line was placed in a box or on a rack, and the information was broadcast to these transmitters by loud-speaker; that some customers would call in for certain information which would be given them and then would hang up; that others would ask to hold on and sometimes as many as six telephone lines were receiving the broadcast from the loud-speaker at the same time; that the first news was received and given out over the telephones about 11 A. M. of each day except Sunday. The principal news handled was that of horse racing and consisted of: First, the lineup for the day's races at the various race tracks throughout the country, the scratches, the jockeys, the condition of the track, and the betting odds. As the time for the various races approaches, the changes in odds are given, and this is followed by a description of the running

of the race, giving the positions of the horses, the winners, the running time, and the mutuels.

In addition to this racing news, complainant also gives the news of major league baseball games by innings, football and basketball games by periods when in season, and other major sports events. It also published and distributed a sport sheet known as "Sport Ray." He has been connected with this kind of business for about twenty-three years, has been in business at his present location and under his present name for about four years. From 1940 up to the time he established his present location, he had his business at a place known as "Green Hills" in Platte county, several miles north of Kansas City. Prior to that he was in business at Kansas City, Kansas, for awhile, and prior to that in the New York Life building in Kansas City, Missouri, for a number of years. He moved from Kansas City, Kansas, back to Missouri after his Western Union Telegraph Company service had been cut off because the Federal government charged that the service was being used to violate the law. Following this, complainant filed an injunction suit against the Western Union Telegraph Company in the United States district court at Kansas City, and the court denied the injunction and dismissed the petition.

Complainant further testified that, in addition to this news service by telephone which he furnished in Kansas City, he also furnished a similar news service by teletypewriter to a customer in St. Joseph, Missouri, another in Wichita, Kansas, another in Omaha, Nebraska, another in Lincoln, Nebraska, another in Sioux City, Iowa, another in Council Bluffs, Iowa, and another in Tulsa, Oklahoma.

Complainant's books pertaining to his business, which he produced at the request of the attorney general, showed that for these various teletypewriter services, he received anywhere from $100 per week from the St. Joseph customer, to as high as $450 per week from the customer in Omaha, Nebraska. He further testified that he had the exclusive agency for this news service in western Missouri and the states of Iowa, Kansas, Nebraska, and Oklahoma, and that his service was the only service of that kind obtainable in all that territory. The books also showed the names of complainant's customers in Kansas City and in each of the other cities mentioned. Those in Kansas City who received the news service by telephone were listed on the books by last name followed by an initial, such as "Looney, R," "Doyle, J," "Green, B," etc. Complainant claimed that he did not know any of his customers personally nor their addresses; that they usually contacted him by telephone if they wanted his service, a few came to the office, and, when the price was agreed upon and payment was made in advance, the customer was assigned a number such as 1, 2, 50, etc., and as long as he continued to pay for this service weekly in advance, he was given the service whenever he called in and requested same; that when any customer wanted service, he would call one of the telephone numbers of complainant's telephones and give to the operator in complainant's office the number which complainant had assigned to that customer, and then state what service he wanted; that is, whether he wanted specific information only or wished to be put on the rack for a period of time to receive the broadcast of the news over the loudspeaker.

The Company assigned to complainant's telephones numbers as follows: Grand 2750 to 2756, inclusive; Grand 2852 and 2853, and Grand 2879. If Grand 2750 is dialed, then any of the following successive numbers where the line is not in use will automatically be called. Likewise, if Grand 2852 is dialed and that line is busy, the 2853 will automatically be rung.

Complainant further testified that the advance payments for the service to his Kansas City customers were made by check delivered to his office through the United States mails; that the customer in each instance put the number assigned to him upon his remittance check and also on the outside of the envelope, and upon receipt of the envelope containing the check, complainant looked at the number on the envelope and on the check to determine who was making the payment, and then sent the checks to the bank; that he paid no attention to the signatures on the checks, did not look to see what the signature might be, but only looked for the number; that he did not know who signed any of the remittance checks.

Complainant also stated that he had had substantially the same customers for some time; that occasionally a customer would discontinue the service or would quit paying in advance and complainant would cut off the service, but that he usually had the full nine customers and on one occasion he had had ten customers; but that when a customer dropped off or quit the service, another customer would be put on; that he did not have any waiting list of customers, made no efforts to advertise or sell this service, but that when there was a vacancy on any line,

somebody would just call in and ask for the service and would be assigned a number and given the service as requested. No explanation whatever was offered as to how these prospective customers could find out that there was a vacancy. Complainant stated that he had no connection with bookmaking places, that no bets were taken or recorded at his place of business, and that in all of his twenty-three or twenty-four years in business he had only been in one bookmaking place, and that was a place in Kansas City about 1937 or 1938, and that this place, when he was in there, was getting information such as complainant furnishes his customers.

When asked what kind of a business other than a bookmaking establishment would want complainant's service, he said, "I don't know." He was then confronted with the following questions and made the following answers:

Mr. Taylor: You don't know of any, is that your answer?

A. I just don't know whether it could be used in a bookie joint or not.

Q. I will ask you if I didn't ask you this question and you didn't make this answer at the hearing before Judge Cook: (Reading) "Can you tell me any kind of business other than a bookie business that would want this service?" Answer: "No."

A. I might have made that answer but I had just come from the hospital where my wife was operated on just before the testimony there.

Q. You were confused?

A. Very confused. My wife was in surgery for an hour and a half that same morning.

Q. But you wouldn't say you didn't make that answer?

A. If the record shows that, I probably did, but I didn't mean it that way.

Q. Well, can you tell me again—you are not confused now, are you, Mr. Partnoy?

A. I don't know what it could be used for.

Q. You don't know what it could be used for.

A. No, sir.

In connection with complainant's testimony as to his one venture into a bookmaking establishment, and reflecting upon his knowledge of the use made of his news service, he was asked the following questions and made the following answers:

Q. You testified at the hearing before Judge Cook recently?

A. Yes, sir.

Q. I will ask you if I didn't ask you this question and you made this answer: (Reading) "So contrary to anything that may be alleged in the petition, you did know that the service which you were working with was being used by book joints at that time?" Answer: "That is right." I will ask you if that question wasn't asked and you didn't make that answer.

A. Maybe I made it, but I didn't mean to make it in that manner.

Complainant denied any knowledge of raids by law enforcement officers upon bookmaking places and denied any knowledge that such raids might affect his business or cause him to lose customers. He denied any knowledge

whatever of the business of any of his customers, but in that connection he was asked the following questions and made the following answers:

Q. I will ask you if at the hearing before Judge Cook I didn't ask you this question: "Would you tell the court that in the twenty-four years, or however many years it has been, that you don't know a single customer at that time or what business they were engaged in?," and you made the following answer: "I think I told them in 1938 I had went to places where they had this rapid information, they were bookmakers." Did you make that answer?

A. I might have made it, yes, I probably did, but I didn't mean it that way.

Following complainant's testimony, a number of metropolitan newspapers published in some of the major cities throughout the United States were offered in evidence, for the stated purpose of showing that such newspapers carried the same news and information as was given by complainant over the telephones. With this showing, complainant rested.

The Company called as a witness H. D. Boyles, who testified that he is general commercial engineer for the Southwestern Bell Telephone Company, and that a part of his duties is the designing of rate schedules and rules and regulations to be filed in the tariffs filed with this Commission and the Federal Communications Commission. He further stated that the rule involved in this case is a 1943 rewrite of a previous rule dealing with the same subject, which has been in effect since 1919; that this rule or a similar rule was deemed advisable by the

Company to protect it against the possibility of criminal prosecution as an accessory for furnishing telephone service used to violate the law, and to protect the Company from civil liability should it comply with a request such as was made by the governor and attorney general in this case.

Following this testimony, the Company offered in evidence the telegram from the governor and attorney general and rested its case.

The attorney general called as his first witness one James B. Smith, who testified that he was employed by complainant; that Partnoy had four employees; that it was the duty of the witness to answer the telephones and give the customers the desired information, and that if more calls came in than he could answer in the usual manner for use of the telephone, he put the telephones on the rack or in the box and broadcast the news to them over a loud-speaker; that when a customer called in for service he would give the number that had been assigned to him and ask for what he wanted. Generally, this witness described the conduct and character of the business about the same as it was described by complainant.

Next followed the testimony of ten law enforcement officers, either members of the Kansas City police force or the state highway patrol, who testified about various instances when book making establishments in Kansas City, North Kansas City, and Green Hills, in Platte county, were visited and later raided, or raided without a previous visit. All this evidence showed beyond question that the unlawful business of taking bets and mak-

ing books upon horse races was being carried on at these various places, and that these places were receiving the news and information concerning horse races and betting thereon by use of telephone equipment of the telephone company, and that the information being used and received at these various bookmaking places was information of the same character and import as that given by complainant over the telephone.

In some instances the telephone instrument in the bookmaking establishment had hooked into it earphones. In other instances connections were made with a loud-speaker system. Various pieces of evidence of bookmaking on horse races were found in each of the raids, such as pin-up sheets, recordings of bets and various other equipment used generally by bookmakers; even sizable sums of money. These raids were at various times from 1942 down to as late as March of this year. Members of the state highway patrol testified that on two different occasions they visited at Green Hills, in Platte county, and saw the bookmaking establishment there in full operation, with a number of people present as customers, placing bets on horse races at various windows for that purpose, and receiving the broadcast of the news of races being run at various race tracks, and bets being paid to various of the customers after the races had been run. There were many other details of these raids shown in the evidence that are not discussed because we think it sufficient to say that there was ample evidence of unlawful activity, and various of these raids resulted in arrests and convictions in municipal court for gambling.

At one bookmaking establishment in Kansas City, where a raid was conducted, there was found in the drawer of a desk numerous tickets showing bets on various horse races, and also a card on which was listed ten telephone numbers, three of which were the numbers of telephones used by complainant.

The attorney general's last witness was the manager of the business office of the Company in Kansas City, who testified to the numbers of the telephones used by complainant, and that of all the telephones used by complainant only one was listed in the telephone directory, that being Grand 2750. If that number were dialed, it would automatically ring any of the phones of the number series of 2750 to 2756, inclusive, in the order of their numbers, if the lower numbered lines were busy. He further testified that the numbers of the telephones used by Partnoy, which were not listed in the directory, could not be obtained from the telephone company and would not be given out by the Company to anyone except upon compulsion by legal process.

All of the parties to this cause were granted leave to file written briefs and did file exhaustive and enlightening briefs, which have been a great aid to the Commission in determining the issues involved. As we view it, there are two questions presented for decision. The first question presented is the validity and reasonableness of the Company rule involved. The second question is the propriety of the application of the rule under the facts in this case. Other legal points have been raised by the

parties but we believe that these will be disposed of as incidental to these two main questions.

Taking up first the vadility and reasonableness of the rule, we look to the applicable Public Service Commission Laws (Mo Rev Stats 1939, Chap 35, Arts 1 and 5).

Section 5592, Art 1 of Chap 35, Rev Stats Mo 1939, dealing with the jurisdiction of the Commission over public utilities, provides in part as follows:

"Jurisdiction of Commission.—The jurisdiction, supervision, powers, and duties of the Public Service Commission herein created and established shall extend under this chapter: . . .

"6. To all telephone lines, as above defined, and all telegraph lines, as above defined, and to every telephone company, and to every telegraph company, so far as said telephone and telegraph lines are and lie, and so far as said telephone companies and said telegraph companies conduct and operate such line or lines, respectively, within this state. . . .

"9. To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined. And to such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly."

[1] In addition to certain positive powers expressly conferred upon the Commission, it is also vested with all other powers necessary and proper to carry out fully and effectively the duties delegated to it. State ex rel. and to

Use of Public Service Commission v. Padberg (1940) 346 Mo 1133, 145 SW2d 150.

[2] The authority of the Commission is referable to the police power of the state, which power may never be abridged. State ex rel. and to Use of Public Service Commission v. Blair (1940) 347 Mo 220, 146 SW2d 865.

[3] As an incident of the Commission's regulation of its business, and particularly due to the provisions of §§ 5664 and 5665, Art 5 of Chap 35, Rev Stats Mo 1939, dealing specifically with service, just and reasonable charges, unjust discrimination, unreasonable preference, and rate schedules, the Southwestern Bell Telephone Company on September 22, 1943, filed with the Commission, as one of its tariff provisions dealing with the termination of contracts, the rule or regulation heretofore mentioned as containing the following language:

The telephone company shall be authorized to discontinue service upon notice from any official charged with the enforcement of the law stating that such service is being used as an instrumentality to violate the law.

No objection having been made to said rule or regulation, within due time the same became entitled to be accorded the force and effect of law, binding upon the utility, the public, and the Public Service Commission. State ex rel. Western U. Teleg. Co. v. Public Service Commission (1924) 304 Mo 505, PUR 1925A 610, 264 SW 669, 35 ALR 328; State ex rel. St. Louis County Gas Co. v. Public Service Commission (1926) 315 Mo 312, PUR 1927A 187, 286 SW 84; Midland Realty Co. v. Kan-

sas City Power & Light Co. (1937) 300 US 109, 81 L ed 540, 17 PUR NS 113, 57 S Ct 345.

[4] Such rule and regulation also became the pronouncement of the public policy of the state, acting through the Public Service Commission as an arm of the state legislature in the particular field of public utility regulation. State ex rel. and to the Use of Cirese v. Ridge (1940) 345 Mo 1096, 34 PUR NS 454, 138 SW2d 1012.

None of the parties, including the complainant, challenges the fundamental jurisdiction of the Commission to make rules and regulations respecting the control of the Company and its relationship to the public as a regulated utility. However, the complainant urges that said rule is unreasonable, arbitrary, oppressive, and unjust, and faulty from its inception because it is of such a nature as to deprive him of certain property rights without due process of law as guaranteed by both the Fourteenth Amendment to the Constitution of the United States and Art I, § 10, of the Constitution of the state of Missouri.

[5] In so far as the complainant's attack on said rule and regulation is concerned, we must rule against the complainant. Said rule operates to relieve the regulated Company from being placed in the dilemma of choosing either the course of continuing service under threat of criminal prosecution as an accessory, if the complainant is actually guilty of a crime, or discontinuing service under the threat of civil liability in the event the accusations are wrongfully made by the enforcement officers.

In the case of Tracy v. Southern Bell Teleph. & Teleg. Co. (1940) 38 PUR NS 527, 528, 37 F Supp 829, the court states:

"Although telephone companies, as public utilities, are required to furnish their facilities to the public indiscriminately so long as such facilities are used for lawful purposes, it is well settled that a telephone company may refuse, and cannot be compelled to furnish service which will be used, or which the telephone Company has reasonable cause to believe will be used, in furtherance of illegal enterprises. No one can be compelled to aid in an unlawful undertaking. The procuring and placing of wagers on horse races in the manner followed by the plaintiffs is unlawful in Florida. Plaintiffs cannot invoke the processes of a court of equity to restrain defendants from discontinuing a public service which the Telephone Company had probable cause or reasonable grounds to believe is being used in the maintenance and conduct of such illegal or immoral enterprise." (Citing numerous cases.)

[6] The Company is not a law enforcement agency and upon being advised by law enforcement officials that its service is being used as an instrumentality to violate the law, it appears only proper that it should have the right to rely on notice from such law enforcement officials as reasonable to believe its service is being improperly used. The rule in the instant case only operates to such effect. As will be noted, said rule does not make it mandatory that the Company terminate such service upon such notice. The rule still leaves the way open for the

Company to continue service if it deems said law enforcement officials to be acting unreasonably and capriciously. In the instant case, we have the governor and attorney general of the state of Missouri notifying the Company that its service is being used to violate the law, with the result of the Company's terminating its service, pursuant to the established rule and regulation above mentioned. That the Company should have the right thus to proceed appears much more reasonable than to burden it with deciding the ultimate fact of whether or not said service is being used as an instrumentality to violate the law, and in the interim being confronted with a charge of criminal liability while continuing service or otherwise discontinuing service under threat of civil liability. Since the Company is a public utility and strictly regulated as such as to all its operations affecting service, it appears reasonable and in the public interest that it be afforded that measure of protection which the rule and regulation affords.

[7-10] Obviously, said rule is not discriminatory as it operates uniformly with respect to all members of the public availing themselves of the company's service. Unless said rule itself is invalid every subscriber contracts for his service upon condition that said service may be cut off under certain circumstances and with actual or constructive knowledge that the right to such service is not an absolute and unconditional one. Even in the absence of such rule there appears no doubt as to the right of the Company to terminate its service, if said service is being used as an instrumentality to violate the law,

and even in the absence of such rule the right of any subscriber to service is always conditional. Hamilton v. Western U. Teleg. Co. (1940) 36 PUR NS 38, 34 F Supp 928. Said rule in itself cannot be held to deprive the complainant of his property, i.e., the right to telephone service without due process of law, unless the action of the company in cutting off complainant's service under said rule also operates to leave the complainant without recourse in the event said service has been terminated without justifiable cause. Thus, in the instant case, the complainant was afforded the opportunity to show that the notice given by the governor and attorney general to the company was unsupported by fact, and the Commission in the exercise of its control over the Company is empowered to order said service restored, or to be more exact, order that said service be continued since the complainant has already invoked legal process to enjoin its termination, despite his argument that said rule denies him due process of law. The further situation exists that any finding of this Commission is also subject to further review by the courts and thus said rule and regulation in no manner denies the complainant a full and adequate remedy before the courts and due process of law is preserved. As was stated in St. Louis v. Missouri P. R. Co. (1919) 278 Mo 205, 211 SW 671:

"All that is meant, in the abstract, by due process of law, despite the numerous definitions of same, is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general law which governs society, and in the concrete, that in a contest in regard to these rights, he will be accorded the opportunity

to contest the propriety of each step in the action sought to be taken against him. The doctrine thus clearly enunciated, found its most unequivocal utterance in the Dartmouth College Case (1819) 4 Wheat 518, 4 L ed 629, which has been frequently affirmed."

[11] Since said rule in itself in no wise operates to deny subscribers the right to test its application to their particular use of the telephone service in the event the right to such use is challenged by law enforcement officials, one remaining question as to its validity might turn on the point of said rule and regulation being such as can be lawfully enacted under the state's proper police power, as an encroachment upon the private right of its citizens to exercise exclusive dominion over their property and contract freely about their affairs. It appears to be somewhat an anomaly that any right to the service, which the complainant now maintains is being denied him by reason of the rule and regulation in force, only exists as a matter of right in the first instance by virtue of the state's exercise of its police power in assuming to regulate the Company as a public utility. In other words, the very service which the complainant now insists is due him as a matter of inherent right, is not an inherent right at all, but is due solely to the fact that in the exercise of its police power the state has previously seen fit, under provisions of the Public Service Commission Act, to require the Company to serve the public without undue or unreasonable preference.

The right of the state, in the exercise of its police power to compel a public utility to serve the public

generally and to operate its business subject to reasonable rules and regulations, is now so well established under the law of the land that citations of authority to such effect would be merely surplusage. Without regulation, no obligation could be imposed upon the Company to furnish the complainant any service. Being under regulation and thereby required to render its service to the public under such reasonable rules and regulations for the conduct of its business as are not in conflict with any duty or liability imposed upon it by law, the Company has filed the rule in question as a measure of self-protection in the conduct of its business. It may very well be argued that this rule is a wholesome one because it operates as a deterrent to criminal activity, but whatever merit there may be in the point it should be noted that we are not sustaining the rule upon that restricted basis.

[12] As so filed and approved, said rule and regulation has the force and effect of law and the same status as if promulgated by this Commission in the first instance. Having the right to compel the Company to render service, it clearly follows that the state has the right to enact conditions under which such service may be terminated. In Nebbia v. New York (1934) 291 US 502, 78 L ed 940, 950, 2 PUR NS 337, 345, 54 S Ct 505, 89 ALR 1469, wherein the court exhaustively discusses many examples of the proper broad exercise of police power, the court states:

"The reports of our decisions abound with cases in which the citizen, individual, or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

"The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest."

This Commission, under all the facts to be considered and the law applicable thereto, can see no cause for now determining that the rule and regulation in question is arbitrary, capricious, unreasonable, and unjust, or that the same is contrary to either the Federal or state Constitution. In seeking to have this Commission disapprove and abrogate the above-quoted rule, it might also be pointed out that complainant introduced no evidence sufficient to sustain the burden of proof cast upon him by virtue of the provisions of §§ 5702 and 5703, Rev Stats Mo 1939, State ex rel. Kennedy v. Public Service Commission (Mo Sup Ct 1931) PUR1932B 504, 42 SW2d 349. Any issues regarding the reasonableness and validity of said rule and regulation must be ruled against the complainant and in favor of the intervening state of Missouri and defendant Company.

Having concluded that the rule in question is a valid and reasonable rule, we now come to the consideration of the question of the propriety of the application of the rule under the facts in this case, and find several factors that must be considered.

[13] Horse racing in the state of Missouri is not unlawful; neither is it unlawful to disseminate news of horse racing, but bookmaking and registering bets upon horse races is unlawful and is made a felony by each of two different enactments of the legislature. Missouri Rev Stats 1939, §§ 4673 and 4674. This we pointed out in Pioneer News Service v. Southwestern Bell Teleph. Co. (1945) 61 PUR NS 47.

If we were to believe complainant's testimony in its entirety, we would be compelled to declare his business lawful, but we are not so gullible as to believe that a business of this kind conducted for profit could or would be conducted in the manner described by complainant, with no knowledge of his customers nor the uses which they were making of the service. We think the evidence clearly establishes that the bookmakers in Kansas City were using the telephonic news service of complainant as a necessary adjunct to their unlawful business. We can understand how a loud-speaker broadcast of the changing betting odds immediately preceding the running of a horse race and a description of the race, from the time the horses leave the starting pens until they cross the finish line, would add to the thrill and stimulate betting, and at the same time give the information that is essential to registering and paying bets.

If complainant knew the use that was being made of his telephonic news service, and there was no other use for his service except that of bookmaking, then he has approached, if not reached, the position of an accessory to the commission of a felony. Stating it otherwise, if this news service of complainant had no other use than to aid and abet in carrying on the unlawful business of bookmaking, and if complainant rendered the service with knowledge of these facts, then his telephone service was being used as an instrumentality to violate the law within the meaning of the Company's rule.

The evidence shows that complainant had the exclusive agency for the dissemination of his news service in Kansas City and western Missouri, and that no one else

was rendering such a service in that territory. All the bookmaking places raided by the Kansas City police and the state highway patrol were receiving racing news over the telephone. At the trial of an injunction suit before Judge Cook of the circuit court of Jackson county, complainant testified that he could not think of any kind of a business other than a booking business that would want his service. When confronted with that testimony, he did not deny it, but attempted to excuse it by saying that he did not mean it that way and that at the time it was given he was confused. Complainant also admitted that at this same hearing before Judge Cook, he testified that he knew that his service was being used by "book joints." This also he attempted to excuse upon the ground of confusion. He also admitted that in his testimony before Judge Cook he stated that in 1938 he went to places that were receiving this rapid news service and that they were bookmakers, but also sought to excuse this testimony by saying he was confused when he so testified.

Testimony of this kind given before Judge Cook is not only revealing upon the question of complainant's knowledge of the unlawful use of his service, but is not compatible with the ignorance of his business which complainant professed at the hearing before this Commission. We think this evidence is sufficient to establish guilty knowledge upon the part of complainant. Even without this testimony by complainant, we think the record as a whole justifies the inference that complainant knew that his service was used exclusively by bookmakers. We are convinced, from all the evidence, that complainant's service had no purposes other than to aid and abet the carry-

ing on of an unlawful enterprise; therefore, we conclude that the charge of the governor and attorney general, that complainant's telephone service was being used as an instrumentality to violate the law, was founded upon truth and fact and that the Company acted with propriety in applying the rule to complainant.

[14] Had the Company had no such rule, we still think, as pointed out in Pioneer News Service v. Southwestern Bell Teleph. Co. *supra,* that the Company could, with propriety, cut off complainant's service when it found the service was being used in the furtherance of an unlawful enterprise, and we would have approved such action by the Company in this case, had it not had its rule.

While this question has not been passed upon by the appellate courts of Missouri, other courts have considered the question under comparable facts and we believe the weight of authority throughout the United States supports our views. Giordullo v. Cincinnati & Suburban Bell Teleph. Co. (1946)—Ohio Op—, 68 PUR NS 269, 71 NE 2d 858; Howard Sports Daily v. Public Service Commission (1941) 179 Md 355, 38 PUR NS 197, 18 A2d 210; People ex rel. Restmeyer v. New York Teleph. Co. (1916) 173 App Div 132, 159 NY Supp 369; Shillitani v. Valentine (1945) 269 App Div 568, 60 PUR NS 382, 56 NY Supp2d 210; same case (1947) 296 NY 161, 67 PUR NS 150, 71 NE 2d 450; Tracy v. Southern Bell Teleph. & Teleg. Co. (1940) 38 PUR NS 527, 37 F Supp 829; Fogarty v Southern Bell Teleph. & Teleg. Co. (1940) 35 PUR NS 296, 34 F. Supp 251; Smith v. Western U. Teleg. Co. (1887) 84 Ky 664, 2 SW 483; Godwin v. Carolina Teleph. & Teleg. Co. (1904)

136 NC 258, 48 SE 636, 67 LRA 251, 103 Am St Rep 941, 1 Ann Cas 203; Western U. Teleg. Co. v. State ex rel. Hammond Elevator Co. (1905) 165 Ind 492, 76 NE 100, 3 LRA NS 153, 6 Ann Cas 880.

[15] Complainant raises the point that the Company rule in its application to him constitutes a taking of his property without due process of law in violation of the Constitution of the United States and the Constitution of the state of Missouri. As heretofore pointed out, the fact that the Company's action under its rule opened the door of this Commission for the filing of the complaint under consideration, in our judgment serves the requirements of due process.

Being of the opinion as heretofore expressed, it is, therefore,

Ordered: 1. That the complaint of Simon Partnoy, an individual doing business as Harmony Publishing Company of Kansas City, Missouri, against the Southwestern Bell Telephone Company, be and the same is hereby dismissed.

Ordered: 2. That this order shall become effective on the 24th day of June, 1947, and the secretary of the Commission shall serve certified copies hereof upon all interested parties in the manner provided by § 5601, Rev Stats Mo 1939.